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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-654

FRANK J. MERLINO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

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PROPRIETY OF SUPPLEMENT

One of the questions presented to the Court in the petition is based on an intracircuit conflict between the case, *sub judice*, and the decision of the Fifth Circuit in *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979). Subsequent to the filing of the petition for certiorari, the Fifth Circuit entered an opinion on rehearing in the *Hammond* case. The *Hammond* opinion on rehearing makes reference to this case. Further, the United States Court of Appeals for the Fifth Circuit through its Clerk notified the Clerk of this Court by letter as follows:

"The Court has been advised by the appellant that he will seek certiorari on the ground that the decision in this case is in conflict with another decision of this Court, No. 78-5179, *United States v. Hammond*. His petition for certiorari was filed in your Court on October 22, 1979.

"The Court has requested that we forward a copy of the opinion on rehearing in the *Hammond* case dated November 1, 1979 for whatever purpose it might serve your Court."

Question IV of the Petition for Writ of Certiorari reads as follows:

> "Where one panel of a circuit grants a new trial and another panel of the same circuit states it cannot grant a new trial when the defendant in each case declines an invitation to move for a mistrial but instead seeks dismissal of the indictment based on govermental misconduct (which constitutes a denial of Due Process or requires the Court to exercise its supervisory power) the Supreme Court should review based on the intracircuit conflict and the importance of the issues or remand for rehearing *En Banc* Pursuant to Rule 35, Federal Rules of Appellate Procedure."

In the first opinion in *Hammond* filed July 16, 1979, Circuit Judges Goldberg and Wisdom (in an opinion authored by Judge Goldberg) held that where there is governmental misconduct consisting of a FBI agent's statement to a witness to keep the witness from testifying, the defendant's Due Process right to present his witness is denied and the defendant is entitled to a new trial [notwithstanding defendant's refusal to accept a mistrial].

The dissenting opinion of Circuit Judge Vance reflects in *Hammond* I that the defendant objected to the granting of a mistrial and urged that the district judge erred by not dismissing the indictment based on governmental misconduct (598 F.2d at 1015). Judge Vance opined that rather than grant Hammond the new Trial to which he objected, the judgment should be affirmed. (Ibid)

In the case, *sub judice,* a panel consisting of Judges Brown, Tuttle and Thornberry held concerning petitioner's request that the Court exercise its supervisory capacity to dismiss the indictment (or, in the alternative to grant a new trial) as follows:

> "In this respect, the appellant is in the position of asking for a dismissal with no alternative of the grant of a new trial, because after substantially all of the occurrences of which he now complains, the trial court expressly placed upon the defendant a burden of deciding whether he

wished to move for a mistrial. The defendant elected not to do so, standing on his motion for a dismissal of the indictment.

* * * * *

"In the second place, there can be no partial relief granted to the appellant by way of the grant of a new trial. This results from the fact that upon the express invitation of the trial court to make such a motion, the defendant declined to do so, standing firmly on his alleged right to have the indictment dismissed [based on prosecutorial misconduct]."

Based on the direct conflict between the *Merlino* decision and *Hammond* I on the issue of whether the Court of Appeals may grant a new trial based upon governmental misconduct where the defendant seeks a dismissal of the indictment and elects not to move for a mistrial, the petitioner sought leave to file a second petition for rehearing and rehearing en banc in the Fifth Circuit. Leave was granted to file the second petition, but said petition was denied. (See Appendix C and D at pp. A-14, 15 in the Petition for Writ of Certiorari).

Subsequently, on November 1, 1979, the *Hammond* panel issued an opinion on a petition for rehearing. (Said opinion is set forth in the supplemental appendix, *infra*). In the second *Hammond* opinion or *Hammond II,* the panel

makes reference to the *Merlino* case and the effect of refusing to accept a proffered mistrial. In this regard the panel in *Hammond II* stated the following in a footnote:

"We recognize that, by refusing to accept a proffered mistrial, a criminal defendant may sometimes not be allowed to seek a new trial. *See, e. g., United States v. Merlino,* 595 F.2d 1016, 1018 (5th Cir. 1979). But in the exceptional circumstances of this case, as set forth above, and where prejudice to the defendant is clearly established, we do not believe such refusal should be an absolute bar. Furthermore, Hammond did not directly seek a new trial in this appeal; rather, he sought dismissal of the indictment. As explained below, we here offer him the opportunity to take a new trial through exercise of our supervisory power."

This attempt by the *Hammond* II court to distinguish the instant case by citing it for the principle that by refusing to accept a proffered mistrial a criminal defendant *may sometimes not be allowed to seek a new trial* emphasizes the intracircuit conflict. For the panel in Merlino's case expressly held:

". . . the appellant is in the position of asking (595 F.2d at 1017)
for a dismissal *with no alternative* of the grant
of a new trial . . ." (Emphasis added)

The Court in Merlino's case re-emphasized that a new trial can not be had where an invitation to move for a mistrial is declined as seen from the following statement in *Merlino*:[1]

> "In the second case *there can be no partial relief* granted the appellant by way of the grant of a new trial" (Emphasis added) (595 F.2d 1018)

From the foregoing, it is readily apparent that the instant case collides with *Hammond* I and *Hammond* II, and this Court should decide the important question of Federal law, not as yet settled by the Court, as to whether a defendant must move for a mistrial where prosecutorial misconduct pollutes the judicial proceedings in order to be entitled to a new and fair trial.

It should be noted that in *Hammond* I, as a result of the governmental misconduct, a new trial was granted based on due process violations. In *Hammond* II as a result of governmental misconduct, a new trial was granted under the Court's supervisory powers.

Adverting to Questions I and II of the Petition, this Court is urged to exercise its supervisory powers to purge the omnipresence of prosecutorial misconduct and also to grant review

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1. The *Hammond* panel attempts to distinguish *Merlino* by rewriting the holding on this point of law. This is in derogation of the rule that each panel of an appellant court is not free to reconsider the legal rules in a particular situation every time that problem recurs. *United States v. Hernandez*, 580 F.2d 188, 191 (5th Cir. 1978).

based on due process violations as the integrity of the judicial system will not tolerate the perversion of justice by government prosecutors misusing a grand jury and lying to cover up this misconduct.

CONCLUSION

This Court should issue a writ of certiorari to review the judgment and opinion of the Fifth Circuit or, in the alternative, remand the case for an en banc hearing to compel the Fifth Circuit to comply with Rule 35 of the Federal Rules of Appellate Procedure in order that the Circuit maintain uniformity of its decisions.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Larry HAMMOND, a/k/a Larry Hoover, Defendant-Appellant.

No. 78-5179

United States Court of Appeals,
Fifth Circuit.

Nov. 1, 1979.

After defendant's conviction in the United States District Court for the Southern District of Florida at Miami, Wm. M. Hoeveler, J., was reversed in a panel opinion, 598 F.2d 1008, on the ground that the Government's intimidation of defendant's witnesses violated his constitutional right to present his own witnesses to establish a defense, the Government petitioned for rehearing. The Court of Appeals, Goldberg, Circuit Judge, held that defendant's counsel did not waive any claim of prejudice resulting from denial of defendant's constitutional rights by agreeing to allow a stipulation of the witnesses' testimony to be introduced in evidence.

Remanded.

Vance, Circuit Judge, dissented and filed opinion.

1. Criminal Law Key 899

Surrounding circumstances established that defendant's counsel did not waive any claim of prejudice to defendant resulting from Government's unconstitutional intimidation of his witnesses when he agreed to allow introduction in evidence of stipulation as to testimony of such witnesses.

2. Criminal Law Key 1189

Even though defendant, in appeal from his conviction, asked only that indictment be dismissed, Court of Appeals would exercise its supervisory power to protect integrity of judicial process from highly prejudicial government misconduct by according defendant option of new trial.

ON PETITION FOR REHEARING

Before WISDOM, GOLDBERG and VANCE, Circuit Judges.

GOLDBERG, Circuit Judge:

In the original panel opinion in this case, we found unanimously that the government's intimidation of Hammond's witnesses violated his "constitutional right to 'present his own witnesses to establish a defense' " and that, despite his counsel's agreement to stipulate to the testimony of those witnesses, pre-

judice resulted. A majority of the panel determined that the conviction should by reversed, although we refused to dismiss the indictment as Hammond requested.[1] *United States v. Hammond*, 598 F.2d 1008, 1012-15 (5th Cir. 1979.) On petition for rehearing, the Government argues for the first time that, by his counsel's agreement to allow the stipulation to be introduced, Hammond waived any claim of prejudice resulting from the denial of his constitutional rights.

[1] After a careful re-examination of the record, we do not find any such waiver. On the day after the government's actions - on the last day of the trial - Hammond's witnesses refused to testify further. The court, recessing the proceedings to its chambers, was uncertain how to deal with this grave and sudden situation and expressly indicated as much on the record. Hammond's counsel sought, without success, to have the indictment dismissed. When the court offered to grant a mistrial, Hammond's counsel refused - not because he thought there had been no prejudice to his client, but because a mistrial at that time would have been a futile gesture. He twice indicated to the court that Hammond now faced a situation where defense's main witness would testify no further because he feared retaliation by the government in unrelated proceedings pending against him in Colorado. A new trial at that time would have presented the same problems as the present trial. Finally, amid the confusion that reigned and at the urging of both the court and prosecutor, defense counsel agreed to allow the stipulation to be read to the jury.

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1. Judge Vance dissented to that part of the opinion that ordered reversal of Hammond's conviction.

As the Supreme Court stated in *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 2055, 36 L.Ed.2d 854 (1973), "a strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial." In the landmark case of *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), the Supreme Court held that before a court can find a waiver of such rights all the facts and circumstances must show their voluntary and knowing abandonment. Furthermore " ' courts indulge every reasonable presumption against waiver of fundamental constitutional rights" and " 'do not presume acquiescence in the loss of fundamental rights.' " *Id.* (footnotes omitted); *see United States v. Shea,* 508 F.2d 82, 85 (5th Cir. 1975). The right to present one's own witnesses in such a fundamental constitutional right. *Hammond, supra,* 598 F.2d at 1012 n.3. The government's argument is in effect that Hammond waived this right by his counsel's agreement to allow the use of the stipulation.

Applying these standards to the extraordinary circumstances before us, we do not believe that Hammond is barred now from claiming a new trial. The problem in his trial arose in the first instance not by any default of his own, but from the affirmative misconduct of the government through the actions of Agent Peisner. It appears to us that the alternatives posed by the court amounted to a Hobson's choice: either there would be a mistrial, after which a new trial would present the same problems as the present trial, or the trial would proceed on the basis of the stipulation. While this latter course ap-

parently appeared to Hammond's counsel to be the lesser of the two evils, we have, as already pointed out, found it insufficient to protect Hammond's constitutional rights from the prejudice occasioned by the government's actions.[2] Upon consideration

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2. We recognize the difficulties the court below faced in trying to resolve the problems occasioned by the governemnt's misconduct and believe it properly took an active role in coming forward with suggestions for their resolution. The Supreme Court has recognized the propriety of affirmative judicial involvement to protect a criminal defendant from such waiver of fundamental constitutional rights as is claimed to have occurred here. *See Von Moltke v. Gillies,* 332 U.S. 708, 68 S.Ct. 316, 323, 92 L.Ed 309 (1948) (waiver of right to counsel); *Cf. United States v. Garcia,* 517 F.2d 272, 277-8 (5th Cir. 1975) (waiver of conflict of interest of defense counsel). We believe, however, that here the court should have further resisted the "rush-to-justice" that produced the agreement to the stipulations which, in the particular circumstances, were inherently insufficient to protect Hammond's constitutional right. *See Hammond, supra,* 598 F.2d at 1014. While we do not attempt to enumerate all the measures a trial court might take in such circumstances to protect a defendant's rights,we believe that the court might, for instance, have ordered a continuance of the trial until it could further evaluate the nature of the threat to defendant's witnesses and have then tried in some manner to secure their testimony. The excessive haste of the "resolution" achieved is reflected in the stipulation itself which was, as we noted in the panel opinion, "so poorly worded that it undoubtedly confused the jury." *Hammond, supra,* 598 F.2d at 1014 & n.5.

of the totality of the circumstances and the controlling legal principles, we hold that Hammond's counsel's actions in agreeing to the stipulation did not waive Hammond's constitutional right.[3]

[2] We do, however, amend the panel's original order in one respect. Hammond on his appeal asked only that we dismiss the indictment. This we refused to do and instead reversed the case and remanded. Upon re-consideration, we recognize that Hammond must have the option of choosing to abide by the result of the original trial rather than face jeopardy again. We therefore modify our order and remand the case to the district court to allow defendant to obtain a new trial upon

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3. We recognize that, by refusing to accept a proffered mistrial, a criminal defendant may sometimes not be allowed to seek a new trial. *See, e. g., United States v. Merlino*, 595 F.2d 1016, 1018 (5th Cir. 1979). But in the exceptional circumstances of this case as set forth above, and where prejudice to the defendant is clearly established, we do not believe such refusal should be an absolute bar. Furthermore, Hammond did not directly seek a new trial in this appeal; rather, he sought dismissal of the indictment. As explained below, we here offer him the opportunity to take a new trial through exercise of our supervisory powers.

Our disposition of the waiver question allows us to avoid the more difficult question of whether the agreement to the stipulation, made wholly by Hammond's counsel without Hammond's participation, can be considered binding on Hammond himself. *See Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 849, 9 L.Ed.2d 837 (1963); *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 568-9, 13 L.Ed.2d 408 (1965); *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 1248-9, 16 L.Ed.2d 314 (1966).

application to the district court within thirty days from the issuance of our order; otherwise the judgment must be affirmed. We take this action under our supervisory power to protect the integrity of the judicial process from such highly prejudicial governmental misconduct as occurred here [4] and in recognition of the fact that now, after the passage of almost two years from the time of the original trial, the causes for the refusal of the mistrial should be removed.

We therefore remand the case to the district court upon the terms set forth above.

REMANDED.

VANCE, Circuit Judge, dissenting.

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4. The supervisory power of the appellate courts has long been established. As the Supreme Court stated in the case generally recognized for the canonization of that power, "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 613, 87 L.Ed. 819 (1942). *See also Thomas v. United States*, 368 F.2d 941, 946-7 (5th Cir. 1966). The supervisory power gives the appellate courts latitude to fashion remedies such as we have devised in the present case. *See United States v. Crow Dog*, 532 F.2d 1182, 1196-7 (8th Cir. 1976).

The majority's extended opinion answers one but not both of the concerns that prompted my original dissent.

The trial court committed no error. On appeal Hammond did not ask for a new trial. Our inviting him to accept an unrequested new trial is a judicial approach that I am unwilling to take. I would therefore affirm the conviction.